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MISSOULA, MT
2007 MAY 30 PM 1 31
PATRICK E. GUFFY
BY _____
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

BRIAN NAUMAN,

Cause No. CV 07-05-M-DWM-JCL

Petitioner,

SECOND
FINDINGS AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

vs.

STATE OF MONTANA and
SHERIFF/WARDEN CASTLE,

Respondents.

On January 11, 2007, Petitioner Brian Nauman filed this action seeking a writ of habeas corpus. He also moved to proceed in forma pauperis. Nauman is a state prisoner proceeding pro se.

Nauman's petition refers to a "related sister case," *Nauman v. State of Montana, et al.*, No. CV 05-43-M-DWM-JCL (D. Mont. filed Mar. 29, 2005). *See* Pet. (doc. 1) at 1. He states that, "[d]epending on the outcome" of that case, the instant petition "may be withdrawn." He explains that he "simply doesn't wish to lose the availability of the window for filing this instant petition." *Id.*

The petition in Cause No. CV 07-05-M concerns the same conviction and sentence that

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Nauman challenged in Cause No. CV 05-43-M. The difference is that the petition in Cause No. CV 07-05-M challenges the trial court's denial of a motion he filed on September 9, 2005, to withdraw his guilty plea; the Montana Supreme Court's later denial of Nauman's petition for writ of supervisory control on November 23, 2005, *see Nauman v. State of Montana*, No. 05-652 (Mont. Nov. 23, 2005);¹ the Montana Supreme Court's order denying Nauman's motion for rehearing of the petition for writ of supervisory control, *see Nauman v. State of Montana*, No. 05-652 (Mont. Dec. 21, 2005); and the trial court's denial of a motion for rehearing on January 6, 2006. *See* Pet. at 2.

Nothing in the instant petition would change the Court's recommendations for dismissal in Cause No. CV 05-43-M. Later decisions by the state courts do not make Nauman's federal petition(s) timely. Nauman had to file a federal habeas petition within one year of his conviction becoming final, *see* 28 U.S.C. § 2244(d)(1)(A), not within one year of his exhaustion of state judicial remedies as he perceived them. The instant petition is not based on newly discovered evidence, nor does it raise grounds for relief that were not and could not have been raised in the first petition. It seems to arise from Nauman's misunderstanding that an adverse ruling in Cause No. CV 05-43-M will enable him to try again. That is not the case. *See* 28 U.S.C. § 2244(b).

As with Cause No. CV 05-43-M, there is no need to proceed with this case. A certificate of appealability should be denied for the same reasons set forth in the Order and Findings and Recommendation filed in *Nauman v. State of Montana, et al.*, Cause No. CV 05-43-M-DWM-JCL (D. Mont. Apr. 30, 2007).

¹ Copies of this decision and the following one are attached to the Order and Findings and Recommendation in *Nauman v. State of Montana*, Cause No. CV 05-43-M-DWM-JCL.

Based on the foregoing, the Court enters the following:

ORDER

1. All pending motions in Cause No. CV 07-05-M-DWM-JCL are MOOT.
2. This case is CONSOLIDATED with *Nauman v. State of Montana, et al.*, Cause No. CV 05-43-M-DWM-JCL. Cause No. CV 05-43-M-DWM-JCL shall be deemed the lead case. All further docketing, including the docketing of this Findings and Recommendation, shall be done in Cause No. CV 05-43-M-DWM-JCL.
3. The Clerk of Court shall serve a copy of the Findings and Recommendation of the United States Magistrate Judge on Petitioner. Petitioner is advised that, pursuant to 28 U.S.C. § 636, any objections to these findings must be filed or delivered to prison authorities for mailing within twenty (20) calendar days² after the entry date reflected on the Notice of Electronic Filing, or objection is waived.
4. Any objections to the Findings and Recommendation shall be limited to **three (3) pages**, including any affidavit of Petitioner but excluding other exhibits, caption, and certificate of service.
5. Nauman must immediately advise the Court of any change in his mailing address.

The Court also enters the following:

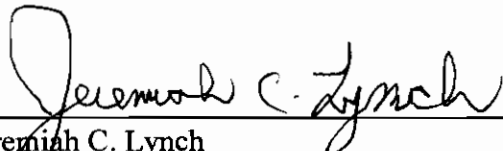
RECOMMENDATION

The Petition in Cause No. CV 07-05-M-DWM-JCL (doc. 1) should be DISMISSED WITH PREJUDICE and a certificate of appealability should be DENIED on the same grounds that are set

² In prisoner cases, this Court extends the time to object to twenty days in order to take into account the somewhat greater mailing time that is involved in sending documents into and out of a prison facility.

forth in the Order and Findings and Recommendation entered on April 30, 2007, in *Nauman v. State of Montana, et al.*, Cause No. CV 05-43-M-DWM-JCL.

DATED this 30th day of May, 2007.



Jeremiah C. Lynch
United States Magistrate Judge